No. 77-450

In the Supreme Court of the United States

OCTOBER TERM, 1977

LARRY PRESSLER, APPELLANT

v.

W. MICHAEL BLUMENTHAL, SECRETARY OF THE TREASURY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF THE SECRETARY OF THE TREASURY TO AFFIRM

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Pursuant to Rule 16(1)(c) of the Rules of this Court, the Solicitor General, on behalf of the Secretary of the Treasury, moves to affirm the judgment of the district court.

OPINIONS BELOW

The initial decision of the district court (J.S. App. 3a-10a) is reported at 428 F. Supp. 302. The order of the district court reinstating its initial decision (J.S. App. 1a-2a) is not yet reported.

JURISDICTION

The judgment of the three-judge district court was entered on July 19, 1977. A notice of appeal to this Court (J.S. App. 24a-26a) was filed on August 2, 1977. The jurisdictional statement was filed on September 21, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

QUESTION PRESENTED

Whether certain of the procedures contained in the Postal Revenue and Federal Salary Act of 1967, as amended, and the Executive Salary Cost-of-Living Adjustment Act of 1975, by which new rates of compensation for members of Congress have been established, are constitutional.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 1, of the Constitution provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article I, Section 6, of the Constitution provides in part:

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. * * *

Section 225 of the Postal Revenue and Federal Salary Act of 1967, 81 Stat. 642, 2 U.S.C. (1970 ed.) 351 *et seq.*, before its amendment in 1977 by Pub. L. 95-19, 91 Stat. 45, is set forth at J.S. App. 27a-32a. Pub. L. 95-19 is set forth in pertinent part at J.S. 5. Section 204(a) of the Executive Salary Cost-of-Living Adjustment Act of 1975, 89 Stat. 421, 2 U.S.C. (Supp. V) 31, is set forth in pertinent part at J.S. 5-6.

STATEMENT

Appellant, a member of the House of Representatives since 1975 (J.S. App. 3a), challenges the constitutionality of two statutes under which the salaries of Senators and Representatives have been determined.

The first statute, the Postal Revenue and Federal Salary Act of 1967, 81 Stat. 642, 2 U.S.C. (1970 ed.) 351 *et seq.*, established a Commission on Executive, Legislative, and Judicial Salaries, composed of nine members.[1] The Commission recommends to the President, once every four years, specific pay rates for Senators, Representatives, federal judges, and certain other officials in the Legislative, Executive, and Judicial Branches. 2 U.S.C. 356, 357. After receiving the Commission's report, the President is required to include in the next budget he submits to Congress "his recommendations with respect to the exact rates of pay which he deems advisable, for [specified] offices and positions within the purview of [the Salary Act]." 2 U.S.C. 358. Under the Salary Act before its amendment in 1977, the rates of pay recommended by the President became effective for the first pay period beginning thirty days after submission of the recommendations, or on a later date specified by the President, unless (l) Congress enacted a statute providing for rates of pay other than

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[1]Three members of the Commission are appointed by the President, and two members each are appointed by the President of the Senate, the Speaker of the House and the Chief Justice. 2 U.S.C. 352.

those the President had proposed or (2) either House of Congress "enacted legislation which specifically disapproves all or part of such recommendations * * *." 2 U.S.C. (1970 ed.) 359(1)(B).

A salary increase recommended by the President under the Salary Act in 1969 was not disapproved and became effective in that year. A further increase recommended in 1973 was disapproved by a Senate resolution in 1974 and did not become effective.[2] An increase recommended in January 1977, after this suit was filed, was not disapproved and has become effective.

On April 12, 1977, the one-House veto provision of the Salary Act was eliminated by Pub. L. 95-19, 91 Stat. 45. The statute as amended requires both Houses to conduct separate votes upon Presidential salary recommendations. Only if both Houses approve a recommendation can it become effective.

The second statute at issue is the Executive Salary Cost-of-Living Adjustment Act of 1975, 89 Stat. 421, 2 U.S.C. (Supp. V) 31, which provides a separate and additional mechanism for increasing congressional salaries. The Adjustment Act makes members of Congress, federal judges, and certain other high-ranking government officials subject to the Federal Pay Comparability Act of 1970, 5 U.S.C. 5301 *et seq.*, which authorizes annual adjustments to the salaries of federal employees governed by General Schedule pay rates and other specified statutory pay systems. The amounts of annual salary adjustments authorized under the Federal

[2] The validity of the Senate's action is at issue in *Atkins* v. *United States*, petition for a writ of certiorari pending, No. 77-214, and *McCorkle* v. *United States*, petition for a writ of certiorari pending, No. 77-486.

Pay Comparability Act is determined by the President in accordance with the detailed standards prescribed by 5 U.S.C. 5305(a) and (b), which are designed to make federal salaries comparable and competitive with salaries found by the President to be prevailing in the private sector. The Adjustment Act directs that congressional, judicial, and certain other salaries are to be annually adjusted by the same percentage as the overall percentage adjustments in GS salaries made under the Comparability Act. See 2 U.S.C. (Supp. V) 31.

In 1975, the President ordered adjustments under the Comparability Act averaging 4.49 percent to be made in the salaries of employees subject to the GS pay system (Executive Order 11883, 40 Fed. Reg. 47091), which became effective on or shortly after October 1, 1975. As a result, congressional salaries were increased at the same time from $42,500 to $44,600 pursuant to Section 204(a) of the Adjustment Act (34 Fed. Reg. 2241; 40 Fed. Reg. 47099).[3]

Appellant filed the present suit in May 1976 seeking a declaratory judgment that the Salary Act and the Adjustment Act violated Article I, Section 6, of the Constitution, which requires that "[t]he Senators and Representatives shall receive a Compensation for their

[3] On October 1, 1976, after the present suit had been filed but before the court had dismissed the complaint, the President announced that further cost-of-living adjustments averaging 4.83 percent would be implemented for the first pay period after October 1, 1976. Executive Order 11941, 41 Fed. Reg. 43889. Such adjustment would have increased congressional salaries to $46,800 per annum. The adjustment was not implemented, however, because Congress specifically refused to appropriate the necessary funds in the Legislative Branch Appropriation Act of 1977, Pub. L. 94-440, 90 Stat. 1439. See H.R. Conf. Rep. No. 94-1559, 94th Cong., 2d Sess. 3 (1976).

Services, to be ascertained by Law * * *" (J.S. App. 11a). Appellant also sought an injunction prohibiting appellees from disbursing congressional salary increases pursuant to those statutes (*ibid.*).[4] On October 12, 1976, a three-judge district court, convened pursuant to 28 U.S.C. (1970 ed.) 2282, dismissed the complaint (J.S. App. 3a-10a). The district court held that appellant had standing on the basis of his allegation that his legislative vote "was impaired by the failure of other members of Congress to assume an affirmative responsibility specifically placed on them by language of the Constitution" (J.S. App. 6a). But the court rejected appellant's position on the merits, holding that the Salary Act and the Adjustment Act satisfy the requirement of Article I, Section 6 (J.S. App. 8a-10a).

Appellant appealed to this Court (No. 76-1005). On May 16, 1977, this Court vacated the district court's judgment and remanded the case for further consideration in light of Pub. L. 95-19, which, as noted (p. 4, *supra*), repealed the one-House veto provision of the Salary Act and substituted the requirement that both Houses must affirmatively approve salary increases under that Act (431 U.S. 169; J.S. App. 22a). On remand, the district court determined that the new legislation does not affect appellant's claims, and it therefore reinstated its prior order (J.S. App. 1a-2a).

ARGUMENT

1. Petitioner's principal argument here, as in his previous appeal, is that the Ascertainment Clause of Article I, Section 6, requires that congressional pay-setting statutes must specify the exact dollar amount of

[4]Appellant now apparently seeks an injunction limiting salary payments to Congressmen to their 1967 level, $30,000, which is 52.2 percent of their current salary of $57,500 (see J.S. 31).

congressional salaries and prohibits such statutes from delegating to the President any authority to participate in the determination of the dollar amount (J.S. 16-23, 24). The district court correctly rejected that contention. The Ascertainment Clause does not by its terms require Congress itself to specify the exact dollar amounts of congressional salaries. It requires only that congressional compensation "be ascertained by Law," and there is no contention that the Salary Act and the Adjustment Act are not "laws" (see J.S. 24).

This Court has consistently declined to restrict Congress to rigid and inflexible procedures in carrying out its constitutional powers. See *Federal Energy Administration* v. *Algonquin SNG. Inc.*, 426 U.S. 548; *United States* v. *Richardson*, 418 U.S. 166, 178, n. 11; *Yakus* v. *United States*, 321 U.S. 414, 424-427. The various statutes providing for the determination of the pay levels of officials and employees of the three branches of government are complex and interrelated. General constitutional principles do not prohibit Congress from enacting mechanisms and prescribing procedures to be used in determining such pay levels. "Necessity * * * fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules * * *." *American Power & Light Co.* v. *Securities and Exchange Commission*, 329 U.S. 90, 105.

The Ascertainment Clause does not impose more stringent requirements with respect to laws governing congressional compensation. The history of the Ascertainment Clause reveals that the Framers intended only to ensure that Congress be accountable to the public for the salary of its members (see J.S. 17-19). The procedures challenged by appellant are fully consistent with the goal of public accountability. Congress remains accountable

for compensation paid pursuant to statutes that it has enacted and can revise.[5] As the district court correctly concluded (J.S. App. 9a-10a):

> Congress continues to be responsible to the public for the level of pay its members receive. There is no concealment; indeed publication of the suggested rate of pay occurs in advance of the pay level taking effect. Moreover, with the growing complexity of all governmental functions a reasonable effort to coordinate congressional pay with pay in the Executive and Judicial branches was certainly not intended to be foreclosed by the ascertainment phase [*sic*]. Congress must always account to the people for what it pays itself, but the Founding Fathers did not contemplate the inflexibility and rigidity which [appellant] seeks.

2. The Bartlett Amendment, Pub. L. 95-19, 91 Stat. 45, repealed the one-House veto provision of the Salary Act, 2 U.S.C. (1970 ed.) 359(1)(B), and substituted a provision that salary increases recommended by the President shall become effective only if both Houses affirmatively approve the recommendation. While the Bartlett Amendment further ensures that Congress shall be publicly accountable for its own salary increases and thus further undermines appellant's constitutional argument, it does not, as appellant would require, specify the precise dollar

[5]In addition, Congress can refuse to appropriate funds for a salary increase authorized to be paid under either the Salary Act or the Adjustment Act—a power that Congress exercised in 1977 (see note 3, *supra*).

amounts of congressional salaries.[6] The district court therefore correctly concluded on remand that the Bartlett Amendment does not affect appellant's claims.

3. In our view, the district court erred in holding that appellant had standing merely because he claimed that "the availability of the procedures created by the statutes under attack make the vote of any single affected Congressman somewhat less efficacious" (J.S. App. 7a). The Salary Act and the Adjustment Act do not deprive appellant of his right or ability to introduce or vote on legislation providing for or prohibiting salary increases. If appellant is unable to gain the support of a majority of his fellow legislators to enact such legislation, the Salary Act and the Adjustment Act are not to blame.

Appellant's claim in essence is that the Salary Act and Adjustment Act improperly delegate legislative authority. Appellant's interest in challenging an allegedly unconstitutional delegation is not personal to him or peculiar to his status as a member of Congress. It is a "generalized grievance [ ] about the conduct of government" (*Flast* v. *Cohen*, 392 U.S. 83, 106), that is shared

[6]The Bartlett Amendment may be subject to constitutional challenges on grounds other than the Ascertainment Clause in particular, challenges based on the claim that the congressional review procedure established by that Amendment constitutes lawmaking without the formal participation of the President, as required by Article I, Section 7 of the Constitution. Appellant's complaint did not raise that issue and it is not presented in this case.

Appellant for the first time, however, suggests that "[t]he propriety of any form of Congressional veto is also questionable, as legislative veto provisions raise a number of Constitutional questions * * *" (J.S. 21). Appellant has not expressly challenged past or present congressional review provisions either in this Court or the court below and the validity of those provisions is not a question appellant presents to this Court (see J.S. 4). Cf. *Atkins* v. *United States* and *McCorkle* v. *United States*, *supra*.

in substantially equal measure by all citizens. That interest is not a sufficient basis for appellant's invocation of the judicial process. *Richardson* v. *Kennedy*, 313 F. Supp. 1282 (W.D Pa.), affirmed, 401 U.S. 901. See also *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208, 220; *United States* v. *Richardson, supra*, 418 U.S. at 173; *Ex parte Levitt*, 302 U.S. 633, 634; *Massachusetts* v. *Mellon*, 262 U.S. 447, 488; *Fairchild* v. *Hughes*, 258 U.S. 126, 129-130.[7] Appellant's lack of standing constitutes a further ground for affirming the dismissal of his complaint.

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[7]Moreover, although appellant has donated part of his increased compensation to charity (see J.S. 31), he has retained some of the increased compensation he has received under the statutes he challenges in this litigation (*ibid.*). He therefore is in the position of asking this Court to violate the principle of " 'not pass[ing] upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.' " *Fahey* v. *Mallonee*, 332 U.S. 245, 255, quoting from *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 348 (Brandeis, J., concurring). Although this principle has been "applied unevenly in the past" (*Arnett* v. *Kennedy*, 416 U.S. 134, 153 (plurality opinion)), it nevertheless presents an additional obstacle to appellant's efforts to establish the existence of a personal injury in fact.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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